HARDIAL SINGH HARI SINGH

v.

ABU TALIB OTHMAN & ANOR

COURT OF APPEAL, KUALA LUMPUR
RICHARD MALANJUM JCA
MOHD GHAZALI YUSOFF JCA
HASHIM YUSOFF JCA
[CRIMINAL APPEAL NO: B-05-12-2003]
23 JUNE 2004

CRIMINAL PROCEDURE: *Appeal - Appeal by vexatious litigant - Litigant restrained from instituting any legal proceedings save by leave of a judge - Whether litigant's failure to obtain leave did not entitle him to pursue appeal - Whether learned judge should have struck out litigant's criminal application against respondents instead of dismissing it - Article 17 of Schedule to Courts of Judicature Act 1964*

The appellant was restrained by a court order from instituting any legal proceedings in any court save by leave of a judge pursuant to art. 17 of the Schedule to the Courts of Judicature Act 1964. There were two gazette notifications to this effect ('the said orders'). The appellant then filed a criminal application against the respondents in the court below but that was dismissed by the learned judge upon the respondents' preliminary objection that the appellant had no *locus standi* to file the said application. Hence, this appeal. The 1st respondent raised a preliminary objection, namely, that the appellant had not been granted leave to institute the proceedings and consequently pursue this appeal.

Held (dismissing the appeal)
Per Mohd Ghazali Yusoff JCA delivering the judgment of the court:

[1] In view of the said orders, the applicant was not in a position to make the application in the court below unless leave was granted by a judge. Also, there was nothing to show that a higher court had reversed the said orders. Since the appellant did not obtain leave of a judge to make the application which clearly tantamount to instituting legal proceedings, the preliminary objection raised by the 1st respondent should be upheld. (p 488 d)

[2] Since the criminal application by the appellant against the respondents was not heard on merits by reason of the legal impediment faced by the appellant, the said application should have been struck out instead of being dismissed. Where a matter is struck out an aggrieved party may pursue to apply for reinstatement. That step is not available if the matter is dismissed. Further, where an application is heard on merits, the proper order that a court should make is either to give an order in terms or dismiss it. (p 488 d-h)

[Order of learned judge dismissing application substituted with application struck out.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu telah dihalang oleh perintah mahkamah dari mengambil sebarang prosiding undang-undang di mana-mana mahkamah kecuali dengan kebenaran mahkamah di bawah fasal 17 Jadual Akta Mahkamah Kehakiman 1964. Terdapat dua pemberitahuan gazet berkaitan halangan ini ('perintah-perintah tersebut'). Berikutnya, perayu memfail satu permohonan jenayah terhadap responden di mahkamah di bawah, tetapi ianya ditolak oleh yang arif hakim atas bantahan awal responden bahawa perayu tidak mempunyai *locus standi* untuk memfail permohonan tersebut. Perayu dengan itu merayu. Responden sekali lagi membangkitkan bantahan awal, iaitu bahawa perayu telah tidak diberi kebenaran untuk memulakan atau meneruskan prosiding di sini.

Diputuskan (menolak rayuan)
Oleh Mohd Ghazali Yusoff HMR menyampaikan penghakiman mahkamah

[1] Mengambilkira perintah-perintah tersebut, pemohon tidak dibolehkan membuat permohonan di mahkamah di bawah kecuali jika diizinkan oleh seorang hakim. Selain itu, tidak terdapat tanda-tanda yang menunjukkan bahawa perintah-perintah tersebut telah diakas oleh mahkamah atasan. Oleh kerana perayu tidak memperoleh kebenaran mana-mana hakim untuk membuat permohonan, yang merupakan suatu prosiding undang-undang, maka bantahan awal responden patut dipertahankan.

[2] Oleh kerana permohonan jenayah oleh perayu terhadap responden tidak didengar atas merit disebabkan halangan undang-undang yang dihadapi oleh perayu, permohonan tersebut seharusnya dibatalkan dan tidak ditolak. Di mana sesuatu perkara itu dibatalkan, pihak yang terkilan mungkin akan memohon untuk memulakannya semula. Langkah tersebut tidak boleh diambil jika perkara tersebut ditolak. Selain itu, di mana sesuatu

permohonan didengar berdasarkan merit, perintah wajar yang harus dibuat oleh mahkamah adalah sama ada membenarkannya mengikut terma ataupun menolaknya.

Perintah yang arif hakim menolak permohonan diganti dengan permohonan dibatalkan.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Pasadena Properties Development Sdn Bhd & Ors [1990] 2 CLJ 961; [1990] 1 CLJ (Rep) 606 HC ***(refd)***

Gan Kim Kiat & Bros Realty Sdn Bhd v. Leang Ah Kan [1983] 1 CLJ 298; [1983] CLJ (Rep) 558 HC ***(refd)***

Gurbachan Singh v. Seagrott & Campbell (No 2) [1962] MLJ 370 ***(refd)***

Hardial Singh Hari Singh v. Abu Talib Othman & Anor [2003] 3 MLJ 173 ***(refd)***

Hardial Singh Hari Singh v. Daim Zainuddin & Ors [1991] 1 CLJ 116; [1991] 2 CLJ (Rep) 701 HC ***(refd)***

Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA ***(refd)***

The Queen v. Robinson & Anor [1898] 1 QB 734 ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 133(1)

Courts of Judicature Act 1964, art. 17 of sch

Appellant in person

For the 1st respondent - Aslam Zainuddin FC

Reported by Usha Thiagarajah

JUDGMENT

Mohd Ghazali Yusoff JCA:

Vide notice of motion dated 27 November 2002, the appellant moved the High Court, Shah Alam for several orders including the following:

1. Notis Usul ini dibicara dengan secara Ex-Parte sehingga kebenaran memulakan prosiding untuk dapat keputusan Penghakiman 12-10-1990 dan dua Perintah digazetkan No. 10937 dan No. 10938 apa bila tidak diketepikan oleh Hakim Mahkamah Tinggi sebagai Perintah yang tidak adalah Perintah muktamad boleh mengetepikan oleh Mahkamah Rayuan.

2. Jika Mahkamah Rayuan tidak bersetuju mengetepikan Penghakiman dan dua Perintah 12-10-1990 tersebut, kebenaran memulakan prosiding ini boleh diberikan kepada Perayu untuk memulakan prosiding tertulis dalam Notis Usul ini. Selepas kebenaran itu prosiding ini dibicara dengan secara Inter-Parte dengan kehadiran kesemua Pihak.

The above orders prayed for, from our reading, referred to three matters:

(a) a judgment of the Court dated 12 October 1990;

(b) Gazette notification No. 10937; and

(c) Gazette notification No. 10938.

The appeal record of this instant appeal showed that the said judgment of the court dated 12 October 1990 relate to the following matters:

(i) Selangor Criminal Appeal No. 41-118-89 wherein the appellant named therein was Hardial Singh a/l Hari Singh, ie, the appellant in the instant appeal and the respondents named therein were Daim Zainuddin & 56 others; and

(ii) Selangor Criminal Application No. 44-26-89 wherein the applicant was again the appellant in the instant appeal and the respondents were Abu Talib bin Othman and MDC Sdn Bhd, ie, the respondents in the instant appeal.

Both these cases arose from a complaint filed by the appellant in the Magistrate Court, Rawang on 22 April 1989 wherein he claimed he was invoking the process provided by s. 133 of the Criminal Procedure Code ("the Code") so that criminal prosecutions could be brought against the persons named therein which included the then Minister of Finance and the then Attorney General, both in their personal names followed by the Central Bank of Malaysia. Section 133(1) of the Code reads:

When a Magistrate takes cognizance of an offence on a complaint:

(a) the Magistrate shall set a date to examine the complainant in accordance with this section;

(b) the Magistrate shall serve on the Public Prosecutor a notice in writing at least seven clear days before the date of the examination of the complainant and such notice shall specify the date of the examination of the complainant and the particulars of the complaint received by the Magistrate under section 128;

(c) the Magistrate shall not proceed to examine the complainant unless the notice required by paragraph (b) has been served on the Public Prosecutor in accordance with that paragraph;

(d) the Magistrate shall examine the complainant upon oath and the substance of the examination of the complainant shall be reduced to writing and shall be signed by the complainant and by the Magistrate;

(e) the Public Prosecutor may appear and assist the Magistrate in the examination of the complainant.

The magistrate declined to take cognisance and dismissed the complaint. What happened next is best described by Mahadev Shanker J (as he then was) who heard the two matters together when it came up before the High Court, Shah Alam, *viz.*, Selangor Criminal Appeal No. 41-118-89 and Selangor Criminal Application No. 44-26-89 (see *Hardial Singh a/l Hari Singh v. Daim Zainuddin & 56 Ors* [1991] 1 CLJ 116; [1991] 2 CLJ (Rep) 701). We will not go into the main facts of the two matters but will only discuss the judgment of Mahadev Shankar J which resulted in the publication of Gazette notifications No. 10937 and No. 10938. The following are the relevant excerpts from his grounds of decision dated 12 October 1990:

> Hardial Singh filed a Notice of Appeal on the 29th April 1989. The Magistrate gave his grounds in writing on the 8th June 1989 in this Appeal which was registered as Rayuan 89-17/89 in Rawang. After being notified thereof the High Court Registrar informed Mr Hardial Singh on the 4th July 1989 that the Appeal had been registered in the High Court under No. 41-118-89.
>
> 4. On the 8th July 1989 Hardial Singh filed a "Petition of Appeal" in the Rawang Magistrate Court against the decision of the Magistrate refusing to take cognisance of his complaint.
>
> 5. Before this appeal was formally disposed of, Hardial Singh did something else.
>
> 6. On the 3rd November 1989 Hardial Singh filed a Criminal Application in the High Court Registry in Shah Alam. This Criminal Application was numbered 44-26-89. The document refers to the Complaint made on 22nd April 1989. ...
>
> 7. This purported Criminal Application named only two Respondents *viz*. The Attorney General by his personal name and MDC Sdn Bhd, and prayed for an order for "suspension and interdict" *(sic)* against the two Respondents. It came up for hearing in Open Court on the 1st February 1990.
>
> 28. Taking everything into consideration I find that the appeal filed (ie, SCA 41-118-89) is devoid of merit and I now dismiss it. I have come to the same conclusion with regard to the Criminal Application now before me and I dismiss it also.
>
> 29. The interests of justice and the good administration of our Courts make it necessary for me to make another order because it is my finding on all the material before me that this is a proper case for the exercise of the power vested in this Court by Article 17 of the Schedule to the Courts of Judicature Act 1964 which reads:

> 17. Power to restrain any person who has habitually and persistently and without reasonable cause instituted vexatious legal proceedings in any court, whether against the same or different persons, from instituting any legal proceedings in any court save by leave of a Judge. A copy of any such order shall be published in the Gazette.
>
> 31. The sad result of all this is a history of vexatious litigation. Bearing in mind the Commentary in the Supreme Court Practice 1979 Vol. 2 para 3390, I consider it desirable that he be restrained from instituting any further legal proceedings except under judicial supervision. I accordingly order that Hardial Singh Sekhon be restrained from instituting any legal proceedings in any Court save by leave of a Judge. A copy of this order shall be published in the Gazette.

As a result of the above order of Mahadev Shankar J, the following notifications, which are the second and third matters referred to in the prayers discussed earlier, were published in the Gazette:

(i) Notification No. 10937 relates to Selangor Criminal Application No. 44-26-89 and it reads, inter alia, as follows:

> ... adalah diperintahkan bahawa permohonan berkenaan dengan ini ditolak dan adalah juga diperintahkan bahawa pada menjalankan kuasa-kuasa yang diberi kepada Mahkamah menurut perkara 17 di dalam Jadual kepada Akta Mahkamah Keadilan 1964, Hardial Singh Sekhon adalah di halang daripada memulakan apa-apa prosiding undang-undang di mana-mana Mahkamah kecuali dengan kebenaran seorang Hakim dan adalah diperintahkan selanjutnya bahawa satu salinan Perintah ini akan diwartakan di dalam Warta.
>
> Diberi di bawah kuasa dan meterai Mahkamah pada 12hb Oktober 1990.

(ii) Notification No. 10938 relates to Selangor Criminal Appeal No. 41-118 Tahun 1989 it reads, *inter alia*, as follows:

> ... adalah diperintahkan bahawa permohonan berkenaan dengan ini ditolak dan adalah juga diperintahkan bahawa pada menjalankan kuasa-kuasa yang diberi kepada Mahkamah menurut perkara 17 di dalam Jadual kepada Akta Mahkamah Keadilan 1964, Hardial Singh Sekhon adalah di halang daripada memulakan apa-apa prosiding undang-undang di mana-mana Mahkamah kecuali dengan kebenaran seorang Hakim dan adalah diperintahkan selanjutnya bahawa satu salinan Perintah ini akan diwartakan di dalam Warta.
>
> Diberi di bawah kuasa dan meterai Mahkamah pada 12hb Oktober 1990.

The effect of the above orders (hereafter referred to as "the said orders") are clear, *viz*., the court, pursuant to art. 17 of the Schedule to the Courts of Judicature Act 1964, has restrained the appellant in the instant appeal before

us from instituting any legal proceedings in any court save by leave of a judge after having found that he is a person who has habitually and persistently and without reasonable cause instituted vexatious legal proceedings.

At the hearing of the application in the High Court, Shah Alam (hereafter referred to as "the application"), which is the subject-matter of the appeal before us, counsel for the respondents raised a preliminary objection, namely, that the appellant had no locus to file the application let alone appear in court. Having given due consideration to the application and the surrounding circumstances and the position of the appellant *vis-a-vis* the said orders, the learned judge dismissed the application with costs (see *Hardial Singh a/l Hari Singh v. Abu Talib bin Othman & Anor* [2003] 3 MLJ 173). In his grounds of decision, the learned judge said:

> ... the application was an embarrassment to the Court, as it was an incomprehensible piece of document, which was beyond understanding. It was unclear as to what sort of order he was seeking from the court, let alone its foundation.
>
> Not only was the application, which was in abominable Bahasa Malaysia, a nightmare to me but beyond comprehension confusing and meaningless even to the interpreters.

In relation to the said orders, the learned judge said:

> At the point of filing this application and at the point of hearing this case, the applicant was yet to be declassified as a vexatious litigant. ... Unless and until the applicant has obtained leave from a Judge, he is thus persona non grata in court and must be restrained from instituting any legal proceedings.
>
> It must be stressed that, even if he had been interested in appealing against the above restriction order, he was out of time, as the appeal period was 14 [fourteen] days from the date of the order beginning from October 12 1990. Without stressing the obvious, he is no less than twelve years out of time. It must be emphasized that the legal requirement to have a matter appealed within a given time, has always been taken seriously by courts, and any detraction from that requirement will face the wrath of the court.

From our reading of the first two prayers found in the application, it is our view that the orders the appellant were seeking are as follows:

(a) the 1st prayer – that his application be heard *ex parte* until leave is granted to him to institute the proceedings until the said judgment of the court dated 12 October 1990 and Gazette notifications Nos. 10937 and 10938 are set aside; in the eventuality the said judgment and the said Gazette notifications are not aside by the High Court Judge, it can be set aside by the Court of Appeal;

(b) the 2nd prayer – if the said judgment of the court dated 12 October 1990 and Gazette notifications Nos. 10937 and 10938 are not set aside by the Court of Appeal, that leave be granted to institute the proceedings and the application be heard *inter partes* with the presence of all parties.

We do not intend to discuss the other prayers found in the appellant's notice of motion as they have no bearing upon the issue at hand before us, *viz.*, whether the learned judge was right in dismissing the application on the ground that the appellant has not been granted leave to institute the proceedings.

Before us, the federal counsel who appeared for the 1st respondent raised a preliminary objection, namely, that the appellant has not been granted leave to institute the proceedings and consequently to pursue this appeal. He urged the court to strike out the appeal. The appellant argued he needed no leave to pursue this appeal. We disagreed. What was clear to us is that in view of the said orders, the applicant will not be in a position to make the application in the court below unless leave has been granted by a judge. As the learned judge had pointed out, the said orders still stand. There is nothing to show that the said orders have been reversed by a higher court. Since the appellant has not obtained leave of a judge to make the application, which was clearly tantamount to instituting legal proceedings, we upheld the preliminary objection raised by the 1st respondent. However, we do not agree to the nature of the order as made by the learned judge. It is our view that since the application was not heard on merits by reason of the legal impediment faced by the appellant, the matter should have been struck out instead of being dismissed. Distinction must be drawn on the legal implications arising on the use of either of those words. For instance, where a matter is struck out due to absence of counsel, the next proper step that an aggrieved party may pursue is to apply for reinstatement. That step is not available if the matter is dismissed (see *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553; *Asia Commercial Finance (M) Bhd v. Pasadena Properties Development Sdn Bhd & Ors* [1990] 2 CLJ 961; [1990] 1 CLJ (Rep) 606; *Gan Kim Kiat & Bros Realty Sdn Bhd v. Leang Ah Kan* [1983] 1 CLJ 298; [1983] CLJ (Rep) 558). Further, where an application is heard on merits, the proper order that a court can make is either to give an order in terms or dismiss it (see *The Queen v. Robinson & Anor* [1898] 1 QB 734; *Gurbachan Singh v. Seagrott & Campbell (No. 2)* [1962] MLJ 370). Hence we hereby substitute the order of the learned judge in that the application is struck out. Since this was a criminal application, the issue of costs do not arise.